IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1069

CANADIAN NATIONAL RAILWAY COMPANY AND
CANADIAN PACIFIC LIMITED,
Appellants,

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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JURISDICTIONAL STATEMENT

Appellants, Canadian National Railway Company and Canadian Pacific Limited, hereby submit their statement as to jurisdiction pursuant to paragraph 2 of Rule 13 of this Court's Rules:

The Decision Below

The unreported decision of the statutory three-judge court convened in the United States District Court for the District of Columbia is reflected in a Memorandum Opinion filed November 30, 1976, attached hereto as Appendix A, and Judgment, also filed November 30, 1976, attached hereto as Appendix B.

Jurisdiction of Supreme Court

The proceeding below was an action brought by the Canadian railroads (Appellants here) to permanently enjoin, suspend, annul and set aside an order of the Interstate Commerce Commission. Such action was at the time required to be brought before a district court of three judges.[1]

On November 30, 1976, the three-judge court denied Appellants' prayer that the Commission's order be permanently enjoined.

Section 1253 of Title 28, United States Code, confers upon this Court jurisdiction of the appeal from the denial of the injunctive relief sought below. The following cases sustain this Court's jurisdiction:

Aberdeen & Rockfish R. Co. v. *SCRAP*, 422 U.S. 289 (1975)

United States v. *SCRAP*, 412 U.S. 669 (1973)

American Lines v. *L. & N.R. Co.*, 392 U.S. 571 (1968)

United States v. *Baltimore and Ohio R. Co.*, 333 U.S. 169 (1948)

Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503 (1944)

Interstate Commerce Commission v. *Hoboken Mfrs.*, 320 U.S. 368 (1943)

Baltimore & O.R. Co. v. *United States*, 298 U.S. 349 (1936)

United States v. *Idaho*, 298 U.S. 110 (1936)

Alton R. Co. v. *United States*, 287 U.S. 236 (1932)

Baltimore & O.R. Co. v. *United States*, 279 U.S. 781 (1929)

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[1] 28 U.S.C. § 2325 (since repealed). Effective January 2, 1975, the courts of appeals of the United States have exclusive jurisdiction to enjoin, set aside, suspend or to determine the validity of orders of the Interstate Commerce Commission (28 U.S.C. § 2342).

Questions Presented

(1) May the Interstate Commerce Commission, in a matter involving railroad rates, issue a "cease and desist" order without having held a hearing?

(2) May the Interstate Commerce Commission, without hearing and under the guise of an "interpretation" or "clarification," substantively modify or amend a prior order?

(3) May the Interstate Commerce Commission, even if its action might be deemed to be a mere "interpretation" or "clarification," deny regulated railroads a hearing when the impact of that action is to reduce railroad revenues by millions of dollars annually and to expose them to complaints for damages?

Statement of the Case

By Report and Order dated March 4, 1971, the Interstate Commerce Commission (the Commission), following an investigation (styled Ex Parte No. 267) into the adequacy of the railroads' freight rates and charges, authorized general rate increases as follows:

> "(1) Intraterritorial traffic within the East—not more than 14 percent.
>
> (2) Intraterritorial traffic within the South—not more than 6 percent.
>
> (3) Intraterritorial traffic within the West—not more than 12 percent.
>
> (4) Interterritorial traffic from and to all territories—not more than 12 percent.
>
> (5) Import and export traffic not more than 12 percent and subject to the limitations heretofore prescribed in this report . . . ."

Increased Freight Rates, 1970 and 1971, 339 I.C.C. 125, 257 (1971).

In accordance with that authorization, the railroads (including Appellants) filed with the Commission a master tariff of increased rates (X-267-B) to become effective on 15 days notice, or on April 12, 1971. This tariff provided, *inter alia*, for an increase of 14 percent in the rates applicable to traffic moving intraterritorially within the East, as well as between points in the East and points in Eastern Canada which has always been considered to be a part of Eastern Territory, and an increase of 12 percent on traffic moving to and from seaports prior (or subsequent) to overseas water movement. The Commission did not, either upon complaint or upon its own initiative, suspend the operation of this tariff, as it was empowered to do under Section 15(7) of the Act; instead, the tariff was allowed to become effective.

More than a year later, on July 10, 1972, Sun Oil Company of Pennsylvania filed with the Commission a petition seeking a declaration that the publication of a 14 percent increase in the rates applicable to certain commodities, or alternatively to all commodities, moving in direct rail service from points in the eastern United States to points in Eastern Canada violated the Commission's increase authorization in Ex Parte 267. The thrust of the Sun Oil petition was that traffic moving all-rail from the United States to Canada was "export" traffic as to which the Commission had authorized a maximum increase of 12 percent in Ex Parte 267.[2]

[2] In an earlier supplemental proceeding, initiated by petition of Alan Wood Steel Company filed July 9, 1971, the Commission had ruled that the movement of a single commodity—iron ore—from Canada, either in direct rail service or water-rail service, was "import traffic" as that term was used in the original report and order in Ex Parte No. 267. However, contrary to the District Court's statements that the railroads "had been served with copies of the petitions" (App. A, p. 7a, n.12) and that "the railroads participated fully" (App. A, p. 10a), the Canadian railroad appellants were never served with notice of that proceeding and never knew of its existence until 9 days after the Commission served its supplemental order. A telegraphic request by the Canadian railroads for postponement in order that the matter be given proper consideration was denied by the Commission. (Transcript of Oral Argument, pp. 8, 99.)

The Commission initially advised Sun Oil Company that its petition would not be processed since copies thereof had not been served upon all parties to the general increase proceeding. Later, however, the Commission waived that requirement on condition that Sun Oil furnish copies to all parties known to have an interest in the rates applicable to the involved petroleum products. Notice of waiver of the service requirement was published in the Federal Register of October 26, 1972 (37 F.R. No. 207, p. 22928). That same notice provided that:

> ". . . any party wishing to participate in the determination of this matter, *should the Commission exercise its discretion in entertaining this petition* for a declaratory order shall notify the Commission's Office of Proceedings . . ." (emphasis added).

On December 8, 1972, and again on February 16, 1973, the Commission was notified by counsel for the Eastern Railroads of their interest in the matter and of their desire to participate.

On August 17, 1973, approximately 10 months after the Federal Register publication, and 29 months after its original report and order, the Commission, without further notice (such as an indication that it had decided to entertain the Sun Oil petition) and without hearing, abruptly served a cease and desist order dated August 6, 1976 (the challenged order) in which it (1) stated that the Sun Oil petition should be treated as one for an "interpretation or clarification" of the original report and order, (2) found that all traffic moving by rail from points in the United States to points in Canada by

direct rail or water-rail service is "export traffic" within the meaning of the original report and order, so that as to such traffic a 12 percent increase was the maximum increase authorized, rather than the 14 percent increase which the Commission had allowed to go into effect 28 months previously, and (3) directed the railroads to cease and desist from charging rates which reflected an Ex Parte 267 increase of greater than 12 percent over the prior Ex Parte 265 level. A copy of this Order is attached as Appendix C.

The Eastern railroads and the Canadian railroads promptly filed petitions to vacate the August 6 Order and for an opportunity to be heard. On October 10, 1973, the Commission served another cease and desist order in which it (1) denied the railroads' petitions to vacate the August 6 Order and for an opportunity to be heard, (2) extended the August 6 Order to embrace traffic *from* Canada *to* the United States, as well as traffic *to* Canada *from* the United States, and (3) again directed the railroads to cease and desist from charging rates on such traffic which reflected an increase in excess of 12 percent. A copy of this Order is attached as Appendix D.

On January 24, 1974, the Canadian railroads filed their complaint in the United States District Court for the District of Columbia, asking that a three-judge court be convened to hear and to enjoin, suspend, annul, and set aside the Commission's order.

On November 30, 1976, the three-judge court filed its Memorandum Opinion and its Judgment, denying the relief sought by the Canadian railroads. The District Court concluded that notice and hearing were not required since the Commission was merely clarifying or more clearly defining what it meant in its prior report and order when it used the term "export-import" and that the challenged order was therefore in accordance with law.

Because of the serious impact on their revenues and because of the substantiality of the questions involved, the Canadian railroad plaintiffs, on December 16, 1976, filed in the United States District Court their Notice of Appeal to this Court.[3] A copy of that Notice is attached hereto as Appendix E.

The Questions Presented Are Substantial

The questions presented in this appeal bear importantly on the viability of the procedural safeguards afforded regulated industry by the Interstate Commerce Act and the Administrative Procedure Act, as well as by the Fifth Amendment to the United States Constitution.

At issue is the question of whether the Interstate Commerce Commission, in the exercise of its responsibilities with respect to railroad rates, may under any circumstances issue cease and desist orders against the regulated railroads without first having held a hearing.

Also at issue is the question of whether the Commission may dispense with notice and hearing requirements, whether imposed under the Interstate Commerce Act for the issuance of a cease and desist order or under the

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[3] As shown in the affidavit attached to Plaintiffs' Rule 62(c) motion to the District Court for suspension of its Judgment, compliance with the Commission's order, as directed by the District Court, will reduce the revenues of the Canadian railroads by more than $2,000,000 annually. The revenues derived by the Canadian railroads from international traffic between Canada and the United States represent a significantly greater percentage of their total revenues than is the case with the United States railroads. For example, in 1973, the Canadian National and Canadian Pacific combined had freight revenues of $1.6 billion, of which $432 million, or 27 percent, were derived from US-Canadian traffic. In contrast, assuming that the revenues from this international traffic divide approximately on an even basis between the United States and Canadian railroads, the revenues derived by the United States railroads from this traffic represent only 3 percent of their total revenues from freight operations ($13.8 billion).

Administrative Procedure Act for the promulgation of a rule, by simply labelling its action an "interpretation" or "clarification", notwithstanding the fact that its action would have an immediate and substantial impact on both the regulated carriers and the shippers they serve.[4]

Appellants submit that the decision below which condones the issuance without hearing of cease and desist orders in railroad rate matters is contrary both to the plain language of the Interstate Commerce Act and to prior decisions of this Court. The District Court's acceptance of the Commission's own characterization of its action as interpretative only would, if allowed to stand, set a dangerous precedent undermining the procedural safeguards against arbitrary administrative action.

This Court should summarily reverse the decision below in recognition of the danger to procedural safeguards which it represents, not only to the regulated carriers but to all who may be affected by Commission action; alternatively, this Court should note probable jurisdiction in order that it may, in light of confusing lower federal court decisions concerning the distinction

[4] In an affidavit attached to their Points and Authorities In Support of Motion for Summary Judgment, the Canadian railroad plaintiffs demonstrated that the joint international through rates applicable to all-rail traffic between the United States and Canada bear a definite relationship to the domestic United States rail rates, a relationship which would be disrupted by the Commission's action here challenged. For example, the railroads maintain identical rates on fertilizer traffic originating at Niagara Falls and Robinson, Ontario, and just across the border at Buffalo, New York. The railroads also maintain identical rates on the movement of automobile parts from Framingham, Massachusetts to Detroit, Michigan and to Windsor, Ontario. In order to maintain rate relationships among these competing shippers and receivers, the domestic United States rate and the joint international through rate have always taken the same general increase. The decision below would disrupt those long-standing rate relationships by requiring the railroads to publish rates for Canadian-United States traffic which will be lower than the rates applicable to competitive traffic moving within the eastern United States.

between substantive and interpretative rules, for the first time give some definition to the circumstances in which an administrative agency may act without hearing and in which it must, either as a statutory mandate or as a matter of procedural due process, hold a hearing before it acts.

A. THE CHALLENGED ORDER IS A "CEASE AND DESIST" ORDER WHICH CANNOT BE ISSUED WITHOUT HEARING.

The Commission's authority to issue cease and desist orders in respect of railroad rates is derived exclusively from Section 15(1) of the Interstate Commerce Act. That section provides in part as follows:

> "That whenever, *after full hearing*, upon a complaint made as provided in section 13 of this part, or *after full hearing* under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, charge . . . is or will be unjust or unreasonable . . . or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare or charge . . . and to make an order that the carrier or carriers shall *cease and desist* from such violation . . ." (49 U.S.C. § 15(1); emphasis added).

The Order of August 6, 1973, and the Order of October 5, 1973, were "cease and desist" orders, directing the railroads to cease and desist from charging rates which the Commission concluded were unlawful. The issuance

of those orders without hearing contravened the plain language of Section 15(1) of the Act.[5]

This Court has recognized the plain dictates of Section 15(1). In *I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88 (1913), the Court rejected the Commission's argument that an order issued under Section 15(1) could not be set aside even if the finding was wholly without substantial evidence to support it, noting that:

> "[T]he statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. * * *
>
> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; . . ." (227 U.S. at 91).

And, as Chief Justice Hughes observed, writing for the Court in *Atchison, T. & S.F. Ry. Co.* v. *U.S.*, 284 U.S. 248, 262 (1932):

> "The important and salutary functions of the Commission to enforce public rights are not to be denied or impaired. But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements. Its duty under [section] . . . 15(1) of the Interstate Commerce Act has not been changed . . . . In the discharge of its duty, a fair hearing is a fundamental requirement."

[5] This case does not raise questions as to the nature of the hearing required, such as concerned this Court in United States v. Florida East Coast R. Co., 410 U.S. 224 (1973). Here, no hearing of any kind was held.

The challenged cease and desist order was issued without any hearing; it is clearly unlawful.

B. THE CHALLENGED ORDER SO VITALLY AFFECTS THE RAILROADS THAT IT MAY NOT, HOWEVER CHARACTERIZED, BE ISSUED WITHOUT HEARING.

The District Court, overlooking the basic character of the involved orders as cease and desist orders, concluded that no hearing was required because the involved orders were but an attempt by the Commission to clarify or more clearly define what was meant by the term "export-import" as used in its prior report and order:

> "These subsequent orders of August 6, 1973 and October 5, 1973 served to remove an apparent ambiguity and to correct the railroads' erroneous interpretation as to the rate increases authorized by all-rail traffic moving to and from Canada and Eastern Territory of the United States. Since the orders were interpretations and clarifications, they were exempt from the Administrative Procedure Act's notice and hearing requirements" (App. A, p. 13a).

The District Court concedes that the Commission's report was "ambiguous and confusing" (App. A, p. 10a), but condones the Commission's subsequent action as merely serving to correct the "railroads' erroneous interpretation as to the rate increases authorized" (App. A, p. 13a)—an interpretation which the Commission itself apparently shared when it failed to suspend the master tariff of increased rates which the railroads filed pursuant to that authorization.[6]

[6] As the United States and Interstate Commerce Commission indicated in their Joint Brief below (p. 4), a general rate increase authorization is a "promise" by the Commission not to suspend rate increases filed in accordance with that authorization.

The District Court accepted the simplistic proposition that when the Commission used the term "export-import traffic" in its Ex Parte 267 report, it used that term in the dictionary or customs sense, that is, traffic moving from one country to another. In the words of the District Court, "it is clear that the basic character of the traffic itself remains unchanged—it is 'export-import traffic'" (App. A, p. 12a). The District Court failed however to recognize (1) that the administrative proceeding was one involving railroad rates, (2) that in railroad ratemaking the term "export-import" has traditionally had reference to traffic moving to and from inland points to seaports for overseas transshipment,[7] and (3) that in its original report and order in Ex Parte 267 the Commission clearly used the term "export-import" in that traditional, ratemaking sense.

Thus, when the Commission issued its Order of August 6, 1973, ruling that all-rail traffic from the United States to Canada was "export traffic" it did not merely "interpret" or "clarify" its prior report and order; in fact, the Commission made a substantive modification or amendment of that order. Moreover, even if the involved orders could accurately be characterized as "interpretations" or "clarifications," the impact of those orders upon the regulated carriers is so substantial that a hearing was required as a matter of fundamental fairness.

1. The Involved Order Was Not A Mere "Interpretation" or "Clarification"; It Constituted a Substantive Modification or Rule As To Which The APA Requires a Hearing.

In its original report and order in Ex Parte 267, the Commission limited to 12 percent the increase au-

[7] See Affidavit attached to Plaintiffs' Points and Authorities in Support of Motion for Summary Judgment.

thorized for rates applicable to "export-import traffic," describing that traffic as follows:

> "Whether there exists, or should exist, a particular relationship in rates on *import or export traffic passing through various seaports* requires careful and detailed consideration of their particular circumstances. The origin or destination areas from and to which the traffic flows requires determination. It is most unlikely that traffic originating within 50 miles of a west coast port will flow through a gulf port merely because rates to the latter are increased in these proceedings by a lesser percentage. We could not do justice to the many commercial interests affected thereby should we attempt to resolve such matters in this proceeding, and our conclusions herein are not to be taken as a prescription of port relationships.
>
> "We are persuaded that, pending more accuarte bases for equitable application of rate increases on import and export traffic, under circumstances where varying regional increases are made, and solely for the purpose of application of the increases authorized in Ex Parte No. 267, an increase on this traffic of not more than 12 percent should be authorized subject to the following limitations;
>
> "(1) *Increases on import and export traffic moving through ports on the Great Lakes* from or to points as to which similar traffic moving through Atlantic or gulf ports is held to a specific increase or percentage increase, shall not exceed that same increase [footnote omitted].
>
> "(2) *Increases on import or export traffic moving through ports on the Pacific coast or west gulf ports* from or to points in western territory, as to which similar traffic moving from or to gulf or Atlantic ports is held to a specific increase or percentage increase, shall not exceed that same increase.

"(3) The term export traffic shall include traffic which moves in such trade whether or not the rate upon which it moves to the port is designated an export rate.

"(4) All existing port relationships duly established by order of the Commission or recognized customs of the trade shall be maintained and preserved. Any disruption in such relationships arising out of the publication of tariffs, pursuant to authority herein granted shall be promptly corrected" (339 I.C.C. at 187-188; emphasis added).

Thus, the Commission plainly contemplated that the "export-import" limitation would apply to rail traffic moving to (or from) seaports prior (or subsequent) to an overseas movement.

This usage of "export-import" is entirely consistent both with prior Commission decisions [8] and with the sense in which that term has long been used in railroad ratemaking. Appellants submitted to the District Court an affidavit demonstrating that the rates on rail traffic between the United States and Canada (described as joint international through rates) have never been considered as "export-import," that the rates on traffic moving between the United States and Canada are directly related to the domestic United States rail rates, and that the rates applicable to "export-import" traffic have been established on an entirely different basis and for different reasons than the international through rates.

In its original report and order in Ex Parte 267, the Commission clearly recognized the distinction between these two categories of rates and traffic. It used "export-

[8] See, for example, Commodity Rates to Mexico, 218 I.C.C. 719, 720 (1936) and, more recently, Investigation of Railroad Freight Rate Structure—Export and Import Rates—Pacific Coast, 345 I.C.C. 423 (1975).

import" in the same sense in which it had always been used, by the railroads and by the Commission itself.

Appellants' submit that the Commission's original report and order was clear on its face and required no interpretation or clarification; the Commission authorized a 14 percent increase on traffic moving within the East, including traffic between eastern Canada and the eastern United States, and a 12 percent increase on traffic moving through seaports in connection with overseas water movement. The Commission's subsequent change in that order, more than two years later, was not a mere "interpretation" or "clarification" of the original order and its own actions belie the contention that it was:

1. In response to the Commission's authorization in Ex Parte 267 the railroads filed their master tariff of increased rates (X-267-B) in which they applied a 14 percent increase to the rates applicable to rail traffic within Eastern Territory, including traffic to and from points in Eastern Canada, and a 12 percent increase to the rates on traffic to and from seaports prior and subsequent to an overseas water movement. The Commission did not suspend that tariff, as it could have done, and by clear implication acknowledged that the published increases were in conformity with its original report and order.

2. If, in considering the merits of the petition filed by Alan Wood Steel Company (page 4, *supra*), which itself arose in rather unique circumstances, the Comission had been of the view that publication of a 14 percent increase in the

[9] The Alan Wood petition raised the question of whether the Commission's Ex Parte 267 order authorized a different increase (14% v. 12%) for the identical 18 mile rail movement from the Port of Philadelphia, depending on whether the iron ore arrived at that Port following an intercoastal water movement from Labrador or following an overseas water movement from South America.

rates on *all* traffic moving between eastern Canada and the eastern United States exceeded the Ex Parte 267 authorization, it could easily have "interpreted" or "clarified" its order at that time. It did not do so.

3. In July of 1972, when Sun Oil Company filed the petition which ultimately (13 months later) resulted in the challenged order, the Commission was squarely presented with the propriety of the 14 percent increase applied to the rates on all commodities moving between eastern Canada and the eastern United States. If this were simply a matter of interpretation or clarification, the Commission could have promptly and readily have done so; instead, the Commission tabled the Sun Oil petition for some 13 months, without even indicating that it would entertain it, before abruptly issuing the challenged order.

The conclusion that the August 6 Order, which was issued some 29 months after the Commission's original report and order and which would impact so substantially both on railroad revenues and on rate relationships heretofore existing among shippers and receivers, is a mere "interpretation" or "clarification" of the prior order and may be issued without hearing, violates all notions of procedural due process.

What is an "interpretation" or "clarification" which may be exempt from notice and hearing requirements?

The Administrative Procedure Act exempts from the notice and hearing requirements applicable to rule making "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice" (5 U.S.C. § 553(b)).[10] In this case, there is no contention

[10] The APA also provides that notice and hearing do not apply to rule making "when the agency for good cause finds . . . that notice and public procedure therein are impracticable, unnecessary, or contrary to the public interest" (5 U.S.C. § 553(b)). No such finding was made in this case.

that the challenged order was a general statement of policy or a rule applicable to agency organization or procedure. The Commission rested its refusal to conduct a hearing on the assertion that its action was an interpretation of its prior order or an interpretative rule. The District Court agreed.[11]

The District Court, in support of its conclusion that the involved orders constituted a mere explanation of particular terms, having no substantive impact, relied in part on *Gibson Wine Co.* v. *Snyder*, 194 F.2d 329 (D.C. Cir. 1952). In that case, the court said that:

> "'A substantive rule is one which, as I have said, is intended to implement the statutory structure or the statutory powers of an agency. An interpretative rule is one which does not have the full force and effect of a substantive rule but which is in the form of an explanation of particular terms of an Act" (194 F.2d at 331).

[11] The Interstate Commerce Act empowers the Commission "to suspend or modify its orders upon such notice and in such manner as it shall deem proper" (49 U.S.C. § 16(6)). Neither the District Court nor the Commission contended that the agency action here involved was justified under that section. Indeed, this Court has recognized the narrow limitations of that power:

> "The Commission, like a court, may, upon its own motion or upon request, correct any order still under its control without notice to a party who cannot possibly suffer by the modification made . . . . This power of the commission is, in adversary proceedings, narrowly circumscribed; and its exercise is not to be encouraged" (Louisville & N.R. Co. v. Sloss-Sheffield S. I. Co., 269 U.S. 217, 225 (1925)).

[12] The District Court also relied upon Pan American Petroleum Corp. v. Federal Power Com'n, 322 F.2d 999 (D.C.Cir. 1963). But reliance on that case is misplaced, as the Court of Appeals merely held (1) that the FPC had statutory authority to modify an order at any time prior to the filing of a petition seeking judicial review of that order, and (2) that the opportunity afforded in the circumstances of that proceeding to submit written evidence and written argument satisfied the requirements of procedural due process. Here, no hearing of any kind was held prior to the issuance of the challenged order.

Appellants submit that the challenged order cannot be viewed as a mere "interpretation" or "clarification" of the Commission's original report and order in Ex Parte 267. The Commission's characterization of its order as such is not conclusive. As this Court said in *Columbia Broadcasting System* v. *U.S.*, 316 U.S. 407, 416 (1942):

> "The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."

Although the reported cases involving "interpretative" rules are somewhat confusing, certain characteristics of such rules have emerged. It has been held that an interpretative rule lacks any substantial impact on the business of the regulated industry, *Continental Oil Company* v. *Burns*, 317 F.Supp. 194 (D.Del. 1970); that it imposes no rights or obligations upon the industry, *Texaco, Inc.* v. *F.P.C.*, 412 F.2d 740, 744 (3rd Cir. 1969); that it "does not substantially affect the rights of those over whom the agency exercises authority," *National Restaurant Ass'n* v. *Simon*, 411 F.Supp. 993, 999 (D.D.C. 1976); and that it has no "retroactive effect," *Continental Oil Company* v. *Burns*, 317 F.Supp. 194, 198 (D.Del. 1970). It has also been suggested that an interpretative rule is simply an indication of how the agency will exercise its discretion in a future case:

> ". . . As the word interpretative suggests, and as the legislative history makes clear, interpretative rules consist of administrative construction of a statutory provision on a question of law reviewable in the courts . . . . The Board's statements [guidelines for parole] are not interpretations of a statute's meaning. Rather, they are self imposed controls over the manner and circumstances in which the agency will exercise its plenary power" (*Pickus* v. *United States Board of Parole*, 507 F.2d 1107, 1113 (D.C.Cir. 1974)).

Similarly, in *Continental Oil Company* v. *Burns*, 317 F. Supp. 194, 197 (D.Del. 1970), it was said that:

> "A great distinction exists between interpretative rules and substantive regulations issued by administrative agencies, especially on the formalities necessary for issuance and in the legal import accorded them. An administrative interpretation or interpretative rule is a clarification or explanation of existing laws or regulations rather than a substantive modification in or adoption of new regulations. Substantive legislative rules and regulations 'create law . . . whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.' *Gibson Wine Co.* v. *Snyder* . . ."

The District Court's acceptance of the Commission's characterization of the challenged order as a mere interpretation was plainly erroneous. *First*, the challenged order, in its conclusion that the term "export-import" as used in the original report and order embraced all-rail traffic between the United States and Canada, constituted a departure from the plain language of the original order and was in effect a substantive modification of that order. *Second*, the challenged order had a direct and substantial impact on the regulated carriers, requiring a reduction in rates and a consequent revenue loss of millions of dollars annually. *Third*, the challenged order had retroactive effect in that it exposed the railroads to complaints for damages (reparations).[13]

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[13] For example, Aluminum Company of Canada, intervening defendant in the District Court, was held by Division 2 of the Commission to be entitled on the basis of the orders involved in this appeal to an award of reparations. Aluminum Company of Canada v. The Alma and Jonuiere Railway Company, et al. (Unreported Decision served July 30, 1974 in Docket No. 35828). On January 21, 1977, the Commission served an order awarding Aluminum Company of Canada partial reparations in the amount of $263,910, in respect of shipments during the period April 12, 1971 through July 31, 1974. At least four other complaints for reparations based on the involved orders are presently pending before the Commission.

2. Even If The Challenged Order Could Be Described As "Interpretative," A Hearing Was Nonetheless Required As A Matter Of Fundamental Fairness.

In *Pharmaceutical Mfrs. Assoc.* v. *Finch*, 307 F.Supp. 858, 863 (D.Del. 1973), the court observed that:

> "Attempting to provide a facile semantic distinction between an 'interpretative and procedural' rule on the one hand and a 'substantive' rule on the other does little to clarify whether the regulations here involved are subject to the notice and comment provisions of section 4 of the Administrative Procedure Act. Rather that determination must be made in the light of the basic purpose of those statutory requirements. The basic policy of section 4 at least requires that when a proposed regulation of general applicability has a substantial impact on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided."

Even assuming *arguendo* that the Commission's action here amounted to no more than the interpretation or clarification of its initial report and order, basic notions of fairness require that the railroads have an opportunity to participate in a proceeding which has such a substantial impact upon them. *Texaco, Inc.* v. *F.P.C.*, 412 F.2d 740 (3rd Cir. 1969); *Independent Broker-Dealers Trade Ass'n* v. *S.E.C.*, 442 F.2d 132 (D.D.Cir. 1971), *cert. den.*, 404 U.S. 828 (1971); *Akron, Canton & Youngstown R. Co.* v. *U.S.*, 370 F.Supp. 1231 (D.Md. 1974).

In *Texaco, Inc.* v. *F.P.C.*, the court considered the impact of a rule requiring the payment of interest, compounded monthly, on refunds ordered by the FPC in determining whether notice and comment procedure was necessary in the promulgation of that rule. The court rejected the agency's argument that the notice and

comment procedure was unnecessary and grounded its rejection on its determination that the rule "cannot be classified as either minor or emergency in character" (412 F.2d at 743).

In *Independent Broker-Dealers Trade Ass'n* v. *S.E.C.*, the SEC exerted pressure in the form of a "request upon the New York Stock Exchange to abolish customer-directed give-ups of brokerage fees (voluntary reductions of fees on lareg transactions). The court held that pressure exerted by the SEC was agency action and subject to judicial review. While holding that a statutory provision governing mandatory orders did not apply, the court noted that "Elementary fairness may well require that reasonable opportunity be given for submission of views by those materially affected. . . ." (442 F.2d at 144). The court then found that the SEC, by inviting comment and conducting public discussion of the fee give-up problem, had satisfied the requirement of "elementary fairness."

In *Akron, Canton & Youngstown R. Co.* v. *U.S.*, the issue before the court was the validity of regulations, promulgated by the Commission pursuant to Section 6(6) of the Interstate Commerce Act, concerning the publication of tariffs. The court found that the new regulations:

> "substantially eliminate the legal burden in effect for decades upon the shipper to learn the tariff rate by examining the tariff schedule in the ICC office or by going to an office of an agent of the carrier to examine it and shift the legal burden to the carrier to furnish the shipper at the shipper's request a copy of any proposed new or changed tariff schedules" (370 F.Supp. at 1240).

The court held that "the proposed regulations . . . establish such an arguably substantial impact upon the

industries as a whole as to require that the rulemaking procedures of § 553 be followed" (370 F.Supp. at 1240).

These decisions reflect the principle established by this Court that where administrative action affects substantial rights a fair hearing is essential to the due process requirements of both the Fifth and Fourteenth Amendments to the Constitution. For example, in *Ohio Bell Telephone Co.* v. *Public Utilities Com.*, 301 U.S. 292 (1937), the Court condemned an order of a state regulatory order directing the payment of rate refunds for years as to which no hearing was held in respect of the utility's rate base, saying:

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints . . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 . . .) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U.S. 468, . . . Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88 . . . The right to such a hearing is one of 'the rudiments of fair play' . . ." (301 U.S. at 304).

More recently, this Court held that where substantial rights are adversely affected by agency action the Due Process Clause requires that the party affected thereby be given an opportunity to be heard before the agency acts. *Goldberg* v. *Kelly*, 397 U.S. 254 (1969).

In the instant case, even assuming *arguendo* that the Commission's subsequent order amounted to merely an

interpretation or clarification of its earlier order, its radical departure from the long-standing definition of "export-import" so substantially impacted upon the rights and obligations of the affected railroads as to require that, in the interest of fundamental fairness, they be given a meaningful opportunity to be heard.

Conclusion

For the foregoing reasons, Appellants ask that this Court hold that the challenged order was not issued in accordance with law and summarily reverse the decision below or, alternatively, that it note probable jurisdiction and set the matter for the filing of briefs and for oral argument.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov. 30, 1976, James F. Davey, Clerk]

CANADIAN NATIONAL RAILWAY COMPANY,

AND

CANADIAN PACIFIC LIMITED,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA

AND

THE INTERSTATE COMMERCE COMMISSION,
Defendants

AND

ALUMINUM COMPANY OF CANADA, LTD., et al.,
Intervening Defendant

Before MACKINNON, Circuit Judge, and WADDY and PRATT, District Judges.

MEMORANDUM OPINION

Waddy, District Judge.

I. *The Procedural Background*

This is an action by plaintiffs to set aside an Order of the Interstate Commerce Commission (the Commission) entered in an administrative general revenue proceeding identified as Ex Parte No. 267, *Increased Freight*

Rates, 1970 and 1971.[1] The Order here challenged is dated August 6, 1973, and concerns freight rate increases authorized for railroads operating between points in Eastern Territory of the United States and points in Canada, and purports to be an interpretation or clarification of the Commission's Report and Order in Ex Parte No. 267. By Order dated October 5, 1973, the Commission denied petitions by the railroads to vacate the August 6th Order. The original defendants and defendant-intervenor have counterclaimed seeking enforcement of the Orders and have joined additional parties defendant to the counterclaim.

Jurisdiction of this Court is invoked under 49 U.S.C. § 17(9), 5 U.S.C. § 559, and 28 U.S.C. §§ 1336, 2284, 2321-2325. Pursuant to 28 U.S.C. § 2325 (since repealed) an action having a filing date of this case required determination by a three-judge court.[2]

Plaintiffs are Canadian National Railway and Canadian Pacific Limited (Canadian railroads). Both are common carriers by railroad, engaged in the transportation of property in Canadian commerce and in foreign commerce, including commerce between the United States and Canada. Both operate partially within the United States. Defendants are the United States of America[3] and the Interstate Commerce Commission (defendants). Defendant-intervenor Aluminum Company of Canada, Ltd. (Alcan) is a corporation organized under the laws of Canada, engaged in the production, fabrication and

[1] The Commission's Report and Order in that proceeding are reported at 339 I.C.C. 125 (1971).

[2] Effective January 2, 1975 proceedings to enjoin orders of the Interstate Commerce Commission are to be brought in the United States Court of Appeals. 28 U.S.C. § 2321(a).

[3] 28 U.S.C. § 2322 requires the United States be named a defendant in any action to enjoin, suspend, annul, or set aside an order of the Interstate Commerce Commission.

sale of aluminum and aluminum products. Alcan ships products from origins in Canada to points in the United States and also receives materials from origins in the United States destined to points in Canada.[4]

Pursuant to 49 U.S.C. § 16(12)[5] defendants and defendant-intervenor Alcan each filed counterclaims seeking enforcement of the Commission's August 6th, and October 5th, 1973, Orders and moved to add 32 additional railroads (Eastern railroads) as parties defendant to the counterclaims. Each of the additional defendants was a party to the Ex Parte No. 267 proceeding, each participates in the movement of traffic between points in Eastern Territory and points in Canada, and each is subject to the Commission's Orders. This Court granted the motions to add the Eastern railroads as parties defendant to the counterclaims, and held that the three-judge court had jurisdiction to hear said counterclaims, and that it was a proper exercise of discretion to consider both the claim and the counterclaims jointly.[6]

The case is now before the Court on the motions of all parties for summary judgment. The Canadian rail-

[4] The Aluminum Company of Canada was a party in interest to the Ex Parte No. 267 proceeding before the Commission and intervened as of right pursuant to 28 U.S.C. § 2323.

[5] 49 U.S.C. § 16(12) provides:

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission, or any party injured thereby, or the United States by its Attorney General may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

[6] *See* Order of this Court dated July 24, 1974.

roads' claim requires the Court to determine whether the Commission, in its Orders dated August 6, 1973 and October 5, 1973, interpreted and clarified its Report and Order in Ex Parte No. 267, or whether it impropery entered supplemental orders without notice and hearing. The counterclaims for enforcement of the Orders require the Court to determine whether, through the tariff updating process, the Eastern railroads issued new rate increases independent of Ex Parte No. 267.

Preliminarily, it is noted that the Court's function in determining the validity of these Commission Orders is not to conduct a trial *de novo*, but is

> "limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States, et al.* v. *Pierce Auto Freight Lines, Inc., et al.*, 327 U.S. 515, 536 (1946).

II. *The Facts*

Pursuant to petitions filed in 1970 and 1971 by most of the railroads in the United States, the Commission instituted an investigation concerning the adequacy of all freight rates and charges of all common carriers by railroad in the United States. On March 4, 1971, as a result of the investigation and hearings, the Commission issued its Report and Order, Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971* authorizing general freight rate increases as follows:

> "(1) Intraterritorial traffic within the East—not more than 14 percent.
>
> (2) Intraterritorial traffic within the South—not more than 6 percent.
>
> (3) Intraterritorial traffic within the West—not more than 12 percent.
>
> (4) Interterritorial traffic from and to all territories —not more than 12 percent.
>
> (5) Import and export traffic not more than 12 percent and subject to the limitations heretofore prescribed in this report . . . ." 339 I.C.C. at 257.

Ex Parte No. 267 was a *general revenue increase proceeding.*[1] In *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975), the Court observed that in such proceedings,

> "The ICC's inquiry has tended to focus on whether the railroads are really in need of increased revenues and has tended to leave for individual rate or refund proceedings under 49 U.S.C. §§ 13 and 15 the problem of determining just which commodities on which runs should bear the increased burden, and to what extent. The ICC is careful to leave such refund claims open by including in the general revenue order a statement [leaving open the determination of particular rates]." *Id.*, at 313.

The Court went on to say:

> "Of course, the ICC has the power in a general revenue proceeding to declare the new rates unlawful and disapprove the increase. It could also, if it chose, declare some of the rates discriminatory, unreasonable or otherwise unlawful; and it could itself affirmatively approve all or some of the rates as just and reasonable. But under the *Louisiana* case [*United States* v. *Louisiana*, 290 U.S. 70 (1933)],

[1] Emphasis added.

> the general rule has been that the ICC may confine its attention in general revenue proceedings almost entirely to the need for revenue and to any other factors that relate to the legality of the general increase as a whole;" *Id.*, at 313-314.

A general revenue order is permissive in nature, and increases taken pursuant to it provide certain advantages for the railroads, *e.g.*, the use of the short-cut Master Tariff, institution of rate increases on less than statutory publication, a shifting of the burden of proof as to whether the rates are reasonable and just.[8]

When the Commission issued a general revenue order, it customarily refrains from exercising its power to suspend tariffs filed pursuant to that order *if such tariffs are within the level authorized.*[9] The rates are still carrier-made, but such rates must be within the limits authorized by Commission Order if the carriers wish to partake of the advantages offered by a general revenue proceeding. The lawfulness of individual rates may still be challenged by a complaint under Section 13 or by independent Commission action under Section 15.

Shortly after the issuance of the Ex Parte No. 267 Order, the railroads published short form Master Tariff X-267-B. The Commission relaxed the statutory 30 day notice requirement,[10] and allowed the railroads to pub-

[8] Background statement, Joint Brief in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, at 3-7. Eastern railroads agree this is a fair and accurate characterization of general revenue orders, Tr. of Hearing, January 20, 1976, at 85.

[9] Emphasis added.

[10] 49 U.S.C. § 6(3) provides: "No change shall be made in the rates, fares, and charges * * * which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid * * *: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified * * *."

lish their Master Tariff X-267-B on 15 days notice. This Master Tariff increased both water-rail and direct-rail rates between points in Eastern Territory of the United States and points in Canada by 14 percent. The Commission did not, either upon complaint or upon its own initiative, suspend the operation of this tariff as it is empowered to do under 49 U.S.C. § 15(7). The rates became the effective legal rates[11] on April 12, 1971.

On August 19, 1971, the Commission applied its Ex Parte No. 267 Order to shipments of iron ore and entered a cease and desist Order[12] declaring that

> ". . . iron ore moving from Canada, as described in the petitions, by direct rail or by water-rail to destinations in Eastern Territory is *import traffic* within the meaning of that term as used in the Commission's [Ex Parte No. 267] decision". (Emphasis supplied)

The railroads did not challenge the Order to cease and desist assessing rates and charges on import iron ore containing increases of more than 12 percent and revised their tariffs accordingly.

The next event in sequence occurred when the Commission entered its Order of August 6, 1973 now under review. This Order grew out of a petition filed by the Sun

[11] When a new carrier-made rate becomes effective, it constitutes the "legal" rate which carriers charge and shippers must pay. A "legal" rate, however, is not necessarily a "lawful" rate for the Commission may, upon investigation, find the rate to be unreasonable or otherwise unlawful.

[12] This Order was entered September 24, 1971 pursuant to a Petition filed by the Alan Wood Steel Company for a Supplemental Order in Ex Parte No. 267 that certain iron ore traffic moving by water-rail containing 14 percent rate increases violated the Commission's Order. The Jones and Laughlin Steel Corporation intervened in the proceeding seeking a determination which included iron ore moving in all-rail service from Eastern Canada to its facilities in Pennsylvania. The railroads had been served with copies of the petitions and filed replies with the Commission.

Oil Company of Pennsylvania seeking a declaratory order that the 14 percent increase on traffic rates applicable to refined petroleum, petroleum products and naphthalene, and alternatively, to all commodity rates moving in all-rail service from points in Eastern Territory to points in Canada, was in violation of the Commission's Ex Parte No. 267 Order. After finding that resolution of the issues in the petition required an "interpretation or clarification" of the Ex Parte No. 267 Report and Order, the Commission concluded that

> ". . . all traffic moving from all points in the United States to all destinations in Canada by direct rail or water-rail (including refined petroleum, petroleum products, and naphthalene) is *export traffic* within the meaning of that term as used in the cited report and order;" (Emphasis supplied)

On August 23, 1973, defendant-intervenor Alcan petitioned the Commission to apply the August 6th Order to traffic moving from Canada to the United States as well as traffic from the United States to Canada. On August 31, 1973, the Eastern railroads filed a petition to vacate the August 6th Order and for an opportunity to be heard. A similar petition was filed by the Canadian railroads on September 4, 1973.

The Commission entered its Order on October 5, 1973, denying the railroads' petitions and ordering them

> "to cease and desist from charging rates on *export-import traffic* moving by all-rail or rail-water routes between Canada and Eastern Territory which have been increased by more than 12 percent over the Ex Parte No. 265 level," (Emphasis supplied)

and further ordering them to correct their tariffs accordingly.

Prior to the Commission's Orders of August 6th and October 5th, the Eastern railroads had revised and up-

dated their *individual commodity rate tariffs.*[13] The current rail rates between Eastern Territory and Canada, with the principal exception of iron ore, contain increases of 14 percent. In so doing, the railroads gave the 30 day notice required by 49 U.S.C. § 6(3) but did *not* utilize symbols or otherwise indicate on the commodity tariffs that *new rate increases*[14] were being proposed. The Commission did not exercise its Section 15(7) suspension powers with respect to these commodity tariffs. As a clue to the Eastern railroads' ultimate position, counsel for the Eastern railroads advised the Commission, by letter on October 16, 1976, that the railroads' tariff updating had been completed and "there were, therefore, no tariffs publishing rates between Eastern territory and Canadian points which are dependent on Ex Parte No. 267 orders."[15] The Commission did not reply to this letter and took no action with respect to its two Orders until it filed its counterclaim in this case on April 29, 1974. No changes have been made to reduce the commodity tariff increases to 12 percent.

III. *The Contentions of the Canadian Railroads*

The Canadian railroads, in substance, contend that the Commission Orders at issue herein constitute supplemental orders or modifications reflecting an abrupt departure from the Order in Ex Parte No. 267, and were allegedly issued without adequate or proper notice or an opportunity to be heard.[16] This conclusion, plaintiffs as-

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[13] Emphasis added.

[14] *Id.*

[15] Exhibit attached to Eastern railroads' answers to the counterclaims of the United States and the Commission and of Alcan.

[16] Under 49 U.S.C. § 16(6) the Commission may ". . . modify its orders upon such notice and in such manner as it shall deem proper." The Commission's authority to modify or amend its

sert, is supported by the meaning ascribed to the term "export-import" in the Ex Parte No. 267 Report and Order, in prior Commission decisions, and by the sense in which the term is understood in the railroad industry. In their view, the term "export-import" should be read to mean that traffic which moves through United States ports to or from foreign points.[17]

Defendants' and defendant-intervenor Alcan's position is that the Commission correctly viewed the Orders as "interpretations or clarifications" of the Ex Parte No. 267 Report and Order. They assert that the Orders were therefore exempt from the notice and hearing requirements of Section 4(b) of the Administrative Procedure Act (5 U.S.C. § 553(b)(A),[18] and further that the railroads participated fully in the determination of the same interpretive issue in connection with the Order of September 24, 1971 on the Alan Wood and Jones and Laughlin petitions as previously noted.[19]

In the Ex Parte No. 267 Report and Order, the Commission authorized an increase of 12 percent for export-import traffic. However, it did not define the term "export-import". Admittedly, the references in the Report to "seaports" and "port relationships" are ambiguous and confusing. 339 I.C.C. at 187-188. According to the record, certain port interests had asserted that dispari-

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previous orders to remove an ambiguity without further hearing, however, is limited to instances in which the subject matter was within the scope of the previous proceeding. *Pennsylvania Railroad Co.* v. *United States*, 288 F. 88 (W.D. Pa. 1923).

[17] Master Tariff X-267-B, however, also raised rates on water-rail traffic by 14 percent.

[18] The Section 553(b)(A) exemption provides: "Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;"

[19] *See* note 12, *supra*.

ties between regional rate authorizations created greater percentage increases on similar traffic, thereby resulting in discrimination, preference and prejudice. The Commission was concerned with maintaining relationships among ports and ruled clearly as to the authorized increases on export import traffic moving through these port interests. Thus, the Report, particularly when setting forth the limitations on the authorized 12 percent increase, makes reference to export-import traffic moving, *e.g.*, "through various seaports", through ports on the Great Lakes", "through Atlantic or gulf ports" and "through ports on the Pacific coast or west gulf ports".[20] When viewed in context, however, those references do not support the conclusion that export-import traffic was necessarily meant to be limited to that traffic flowing through a seaport.

On the other hand, the Canadian railroads concede, as they must, that in the customs sense, all-rail traffic moving between the United States and Canada is export-import traffic. They contend, however, that voluntarily maintained "joint international through rates", established at levels related to the rates applicable to the same commodities moving domestically within the United States and Canada, and not "export-import rates", have traditionally been applicable to such traffic.[21] Defendants and defendant-intervenor Alcan do not dispute that most

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[20] 339 I.C.C. at 187-189.

[21] A "joint rate" is a rate that extends over the lines of two or more railroads, as distinguished from a "local rate", which extends over the lines of only one carrier. A "through rate" is the total rate from a point of origin to a certain destination and may be a local rate, a joint rate, or a combination of separately established rates. "Export and import" rates are a class of rates applicable to shipments to and from foreign countries. Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 8; Joint Brief in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 16, n. 11.

all-rail traffic moves under joint international through rates, but point out that at times such traffic may move under export-import rates. Thus, while the all-rail traffic involved herein apparently can and does move under different rates, it is clear that the basic character of the traffic itself remains unchanged—it is "export-import traffic",[22] and that is the language used in Ex Parte No. 267.[23] It also appears that in the past the Commission has explicitly authorized a separate increase on joint international through rates when such an increase is a different increase from that authorized for export-import traffic.[24] And finally, the Commission specifically subjected the 12 percent increase authorized for export-import traffic to certain limitations. Among those enumerated was

> "(3) The term export traffic shall include traffic which moves in such trade whether or not the rate upon which it moves to the port is designated as an export rate." 339 I.C.C. at 188.

Defendants and defendant-intervenor Alcan contend that the challenged Orders are interpretations and clarifications of the Ex Parte No. 267 Report and Order. Thus, the issue is joined.

In *Gibson Wine Co.* v. *Snyder*, 194 F.2d 329 (D. C. Cir. 1952), the Court of Appeals for this Circuit commented at 331 that

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[22] Affidavit of H. F. Hynes, at 2, attached to defendant-intervenor Alcan's Motion for Summary Judgment. Affidavit of Martin E. Foley, at A-2, attached to defendants' Joint Motion for Summary Judgment. *See also, e.g., Emery & Co.* v. *B. & M.R.R.*, 47 I.C.C. 200 (1917), *Fabricas Auto-Mex., S.A.* v. *N.Y. Central Railroad Co.*, 332 I.C.C. 1 (1967).

[23] *See* p. 3, *supra.*

[24] Tr. of Hearing, January 20, 1976, at 62; Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 16.

> "Generally speaking, it seems to be established that 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means."

An administrative interpretation is of controlling weight unless it is "plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414 (1945). *See also, Thompson Phosphate Co.* v. *Atlantic Coast Line R.Co.*, 282 F. Supp. 698 (S.D.N.Y. 1968). The same is true of administrative interpretations of orders. *Pesikoff* v. *Secretary of Labor*, 501 F.2d 757, 763, n. 12 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1038 (1974); *Gibson Wine Co.* v. *Snyder*, *supra.*

The particular label placed on an agency action is not necessarily conclusive, but it is rather the substance of what the agency has purported to do and has done which is decisive. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, 416 (1942).

The facts and the record herein lead to the conclusion that the challenged Orders are interpretations and clarifications which did not alter or substantively change the meaning of the earlier Report and Order in Ex Parte No. 267. Rather, they represent an attempt by the Commission to clarify or more clearly define what was meant by the term "export-import" in that Report and Order. These subsequent Orders of August 6, 1973 and October 5, 1973 served to remove an apparent ambiguity and to correct the railroads' erroneous interpretation as to the rate increases authorized for all-rail traffic moving to and from Canada and Eastern Territory of the United States. Since the Orders were interpretations and clarifications, they were exempt from the Administrative Procedure Act's notice and hearing requirements

of Section 553(b)(A). *Pan American Petroleum Corp.* v. *Federal Power Commission*, 322 F.2d 999 (D.C. Cir. 1963). Therefore, the X-267-B Master Tariff in publishing increases of 14 percent on all rail export-import traffic violated the Commission's Order in Ex Parte No. 267, and all subsequent individual commodity tariffs providing for 14 percent increases in reliance on Ex Parte No. 267 continue to be in violation of the Commission's Orders issued in that proceeding.

IV. *The Contention of the Eastern Railroads*

The Court turns next to the issue raised by the Eastern railroads in answer to the counterclaims, that is, whether the individual commodity tariffs incorporating 14 percent increases on all-rail export-import traffic were new rates, published in accordance with Commission procedures and independent of the Ex Parte No. 267 Orders.

Section 6 of the Interstate Commerce Act prohibits the filing of any tariffs on less than thirty days notice but permits the Commission in its discretion to allow the railroads to file on less than thirty days notice.[25] In this case the Commission allowed the railroads to file Master Tariff X-267-B on fifteen days notice. That Master Tariff provided for 14 percent increases in rates between eastern Canada and the Northeastern part of the United States—increases in excess of the import-export rate authorized by Ex Parte No. 267.

It is not disputed that the first increases were taken pursuant to the general revenue proceeding through Master Tariff X-267-B, effective April 12, 1971. In its Report and Order in the Ex Parte No. 267 proceeding, the Commission admonished the railroads to update their individual tariffs.

[25] *See* note 10, *supra*.

> ". . . we find that no further complication of freight tariffs should be permitted until those in current use are updated sufficiently to enable shippers and carriers to ascertain the applicable rates and charges with certainty and without unreasonable difficulty. We will expect the respondents to take prompt action to update their tariffs at least to and including the Ex Parte No. 259 level, and *we announce herewith* that, in the absence of overwhelming emergency, we will not entertain petitions for special permission to depart from tariff filing requirements until we are satisfied that adequate progress has been made in eliminating the need for reference to numerous past general increases in the ascertainment of freight rates." 339 I.C.C. at 137.

The railroads began the process of updating individual commodity tariffs on May 12, 1971 and completed that process, including the thirty day Section 6 notice, prior to the entry of the Commission Orders challenged herein.

The Eastern railroads claim that Ex Parte No. 267 permitted the 14 percent increases,[26] but contend that even if such increases were not permitted by Ex Parte No. 267, that Order excused compliance with Section 6 notice requirements only for 12 percent increases. Therefore, they argue, even if the X-267-B Master Tariff 14 percent increases exceeded the Commission's authorization, they would be unlawful only because they were published without complying with the Section 6 notice requirements. Eastern railroads further contend that the individual commodity rate tariffs filed prior to the

[26] Eastern railroads are of the view that the Ex Parte No. 267 order permitted a 14 percent increase. Unlike the Canadian railroads, however, they have not advanced arguments with respect to that position. Tr. of Hearing, January 20, 1976, at 84. Memorandum of Points and Authorities of Additional Defendants to Counterclaims in Support of Their Motion for Summary Judgment on the Counterclaims and In Opposition to Defendants' Motions for Summary Judgment, at 16.

Commission's orders of August 6, and October 5, 1973 and in compliance with Section 6, extinguished the past Section 6 violation and were new rates independent of Ex Parte No. 267 Orders. Defendants and defendant-intervenor Alcan assert that the commodity tariffs simply incorporated and carried forward the X-267-B Master Tariff excessive increases. The short answer to the Eastern railroads' ingenious argument is that if these tariffs actually were meant to publish new rates, the Eastern railroads failed to properly identify them as such by using the appropriate symbols,[27] or in any other way indicating to the Commission or the shipping public the true nature of the rate change so as to permit them meaningful opportunity to examine and oppose the proposed rates before they become effective.

Eastern railroads rely on *Chicago M., St. P. & P. R. Co.* v. *Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1958; as authority for their position. The *Alouette* case involved a challenge to individual tariff rates taken in excess of those authorized in a general revenue proceeding. The Commission dismissed the complaints, even though it found that the tariffs had been published on less than statutory notice and that no authorization for less than statutory notice had been granted. The Court reversed the Commission holding that the excessive rates had not been lawfully established because they had been published on less than statutory notice and that such a rate "could not be the valid, lawful rate even though it became the applicable rate by virtue of being on file

[27] 49 C.R.F. § 1300.2(a)(1) provides in pertinent part: "[a]ll tariff publications and supplements thereto must indicate changes thereby made in existing rates or charges . . . by the use of the following uniform symbols in connection with such changes:

[teardrop shape] to indicate reductions.

[diamond shape] to denote increases.

[triangle shape] to denote changes in wording which result in neither increases nor reductions in charges."

with the Commission." *Chicago M., St. P. & P. R. Co.* v. *Alouette Peat Products, supra* at 455. This axe cuts both ways.

Adopting the rationale of the *Alouette* case, we conclude that the Master Tariff 14 percent increases taken pursuant to Ex Parte No. 267, which this Court has found were in excess of the level authorized therein for export-import traffic, were published on less than statutory notice and were unlawful. The individual commodity tariffs published thereafter, having satisfied the publication requirements of Section 6 became the legal[28] applicable rates which shippers were required to pay. However, this process did not, under the circumstances herein, make them "new" rates.

The complexity of individual commodity tariffs, particularly at the time of the Ex Parte No. 267 proceedings, and the process of updating, whether by the filing of reissues, or the issuance of supplements or conversions, make apparent the necessity and importance of using symbols, or some other notation to fairly give notice as to the nature of the tariff updating or change that is taking place. In filing their individual commodity tariffs, the Eastern railroads did not use the diamond-shaped "rate increase" symbol, but rather used the triangle-shaped "no change" symbol. Thus, the symbol indicated a continuance of the old rate rather than a new rate. The railroads also made use of some short-cut or special permission procedures, which lends further support to the contention that the individual commodity tariffs were merely republishing increases already in effect.[29] And despite the rather lengthy administrative history of this controversy, the record indicates the East-

[28] The "legal" rate may nevertheless be challenged. *See* note 11, *supra*.

[29] Affidavit of Martin E. Foley, at A-5 through A-7, attached to defendants' Joint Motion for Summary Judgment.

ern railroads did not raise the claim that their 14 percent increases on commodities were new rates prior to the Commission's October 5, 1973 Order.

Eastern railroads point out that the Commission did not exercise its Setcion 15(7) suspension powers to prevent the individual commodity tariffs from becoming effective. But, whether higher or lower than the authorized level, the tariffs are still subject to challenge under Sections 13 or 15. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289 (1975); *United States* v. *Louisiana*, 290 U.S. 70 (1933). However, it must be recognized that it is unlikely and improbable that either the Commission or the shipping public would challenge a rate if it had been published without customary proper notice as to the nature of the rate, *i.e.*, whether it was a new rate or an unchanged rate. Furthermore, broad discretion in the exercise of the Commission's power of suspension has clearly been upheld and "judicial review of suspension action or inaction is most severely limited, if not foreclosed." *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 409 U.S. 1207, 1208 (1972).

The 14 percent individual commodity tariff increases on all-rail traffic between Canada and Eastern Territory were taken by Eastern railroads through Master Tariff X-267-B in reliance on authority claimed to have been granted in Ex Parte No. 267. The increases were published in a manner that effectively precluded knowledge by the Commission and the shipping public as to their true nature. Under the circumstances of this case the Commission's Order of August 6, 1973, interpreting and clarifying the term "export traffic" as used in Ex Parte No. 267, and its Order of October 5, 1973, ordering the Eastern railroads to cease and desist from charging rates on "export-import" traffic in excess of the 12 percent rate authorized in Ex Parte No. 267, and directing them to correct their tariffs accordingly, was not an

abuse of discretion and was otherwise in accordance with law. To hold otherwise would permit carriers to take excessive rate increases on particular traffic (export-import here) through publication of a Master Tariff and later to legitimatize such excessive increases merely by filing "updated" individual commodity tariffs and indicating by the use of the standard symbol that "no change" was being made. Actually, in such circumstances a change is being made in the rate over that specified in the prior individual commodity tariff and the use of the "no change" symbol masks that change. Whether, intentional or unintentional, such procedure does not serve as fair notice of what is actually being done and cannot serve as a basis for a *de novo* legitimation of the rate set in the Master Tariff as contended herein by the Eastern railroads.

V. *Conclusion*

An Order of the Commission is presumed to be valid. *Pacific Fruit Express Company* v. *Akron, Canton & Youngstown R. Co.*, 355 F. Supp. 700, 707 (N.D. Ca. 1973). This Court has found that the Orders at issue herein were "interpretations and clarifications" of the earlier Report and Order in Ex Parte No. 267; that the individual commodity tariff increases published by Eastern railroads were not new rates, but were taken pursuant to Ex Parte No. 267; and that increases in excess of 12 percent on all-rail traffic moving between Canada and Eastern Territory taken through Ex Parte No. 267 are in violation of the Orders entered in that general revenue proceeding. We conclude that the Commission's valid Orders should not be permitted to remain unenforced.

On the record in this case this Court finds and concludes that the Commission's Orders of August 6, 1973 and October 5, 1973, are not an abuse of discretion; are not arbitrary and capricious; were regularly made and duly served; and are otherwise in accordance with law.

Accordingly, there is no genuine issue of any material fact, and the defendants, the United States and the Interstate Commerce Commission, and defendant-intervenor, Aluminum Company of Canada, Ltd., are entitled to judgment on their counterclaims for enforcement, as a matter of law pursuant to Section 16(12) of Title 49 United States Code. The motions of the plaintiffs and the additional parties defendant to the counterclaim for summary judgment should be denied.

This memorandum constitutes the findings and conclusions of the Court to the extent that such findings and conclusions may be necessary.

All concur.

/s/ George E. MacKinnon
GEORGE A. MACKINNON
United States Circuit Judge

/s/ Joseph C. Waddy
JOSEPH C. WADDY
United States District Judge

/s/ John H. Pratt
JOHN A. PRATT
United States District Judge

Dated: November 30, 1976

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Nov. 30, 1976, James F. Davey, Clerk]

Civil Action No. 74-167

CANADIAN NATIONAL RAILWAY COMPANY,

and

CANADIAN PACIFIC LIMITED,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,
Defendants

and

ALUMINUM COMPANY OF CANADA, LTD., *et al.*,
Intervening Defendant

JUDGMENT

This action came before a three-judge Court sitting pursuant to 28 U.S.C. § 2325 on the motions of all parties for summary judgment, and upon consideration of said motions, the memoranda of points and authorities in support thereof and in opposition thereto, the exhibits, affidavits, the arguments of counsel and the entire record herein, and the Court having concluded that there is no genuine issue as to any material fact and that defendants, the United States and the Interstate Commerce Commission, and defendant-intervenor Aluminum Company of Canada, Ltd., are entitled to judgment on their counterclaims as a matter of law; and that the motions

of the plaintiffs and of the additional parties defendant on the counterclaim should be denied for the reasons set forth in the Memorandum Opinion filed herein this same day, it is by the Court this 30th day of November, 1976,

DECLARED, ORDERED and ADJUDGED:

1. That the failure of defendants to the counterclaims, Canadian National Railway Company, Canadian Pacific Limited and the 32 Eastern railroads, to limit, under the authority of Ex Parte No. 267, increases on their rates on export-import traffic moving by all-rail or water-rail between points in Canada and Eastern Territory of the United States to not more than 12 percent over the Ex Parte No. 265 level, constitutes a violation of the Interstate Commerce Commission's Order entered in the general revenue proceeding identified as Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971*, on March 4, 1971, as subsequently interpreted and clarified by the Commission's Orders entered on August 19, 1971, August 6, 1973, and October 5, 1973; and further

2. That said railroad defendants to the counterclaims, their officers, agents or representatives are hereby enjoined and restrained from further disobedience of the Commission's Orders entered in Ex Parte No. 267 and are further ordered to obey said Commission Orders and cease and desist from charging rates on the aforesaid traffic in excess of 12 percent over the Ex Parte No. 265 level and to correct their tariffs accordingly; and further

3. That the motion of plaintiffs Canadian National Railway and Canadian Pacific for summary judgment on the main claim be, and the same hereby is, denied; and further

4. That the motion of additional defendants Eastern railroads to the counterclaims for summary judgment on the counterclaims be, and the same hereby is, denied; and further

5. That the motions of defendants, the United States and the Interstate Commerce Commission, and defendant-intervenor Aluminum Company of Canada, Ltd. for summary judgment on their counterclaims be, and the same hereby are, granted; and further

6. That the Aluminum Company of Canada's prayer for attorneys' fees be, and the same hereby is, denied; and further

7. That judgment be, and the same hereby is, entered for the United States and the Interstate Commerce Commission, and the Aluminum Company of Canada, Ltd. on their counterclaims, and against Canadian National Railway and Canadian Pacific on the main claims.

/s/ George E. MacKinnon
GEORGE E. MACKINNON
United States Circuit Judge

/s/ Joseph C. Waddy
JOSEPH C. WADDY
United States District Judge

/s/ John H. Pratt
JOHN H. PRATT
United States District Judge

APPENDIX C

SERVICE DATE
AUGUST 17, 1973

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of August, 1973.

EX PARTE NO. 267
INCREASED FREIGHT RATES, 1971
(SUN OIL COMPANY OF PENNSYLVANIA)

Upon consideration of the record in the above-captioned proceedings, including the report and order of the Commission, 339 I.C.C. 125; and the petition filed on July 10, 1972, by the Sun Oil Company of Pennsylvania seeking a declaratory order pursuant to section 554(e) of the Administrative Procedure Act, 5 U.S.C. 554(e); and

It appearing, That resolution of the issues in the aforesaid petition requires an interpretation or clarification of the cited report and order; and that said petition would more properly be, and it hereinafter is, treated as a petition for such interpretation or clarification;

It further appearing, That petitioner owns and operates petroleum refineries at Marcus Hook, Pa., and Toledo, Ohio, from which it ships refined petroleum, petroleum products, and petrochemicals via direct rail service in tank cars and boxcars in foreign commerce to various destinations in the Dominion of Canada;

It further appearing, That in regard to all export and import traffic, the cited report states at page 187:

> We are persuaded that, pending more accurate bases for equitable application of rate increase on import and export traffic, under circumstances where varying regional increases are made, and solely for the purpose of application of the increases authorized in Ex Parte 267, an increase on this traffic of not more than 12 percent should be authorized * * *.

It further appearing, That rates on refined petroleum, petroleum products and naphthalene moving from origins in Eastern Territory to destinations in Canada published by the Eastern Territory railroads have been increased by 14 percent, purportedly pursuant to the increase authorized in Ex Parte No. 267, *supra*, for rates within Eastern Territory;

It further appearing, That petitioner seeks a determination that the 12-percent limitation prescribed in Ex Parte No. 267, *supra*, be applied to increases in commodity rates on all export traffic handled by Eastern Territory railroads or, alternatively, on petroleum, petroleum products, and naphthalene handled by those carriers; and that petitioner further requests that those carriers be ordered to cease and desist from collecting rates on export traffic to Canada which are increased in excess of the prescribed 12-percent limitation;

It further appearing, That by order dated August 19, 1971, involving a petition for a supplemental order in Ex Parte No. 267 filed by Alan Wood Steel Company, the Commission found that iron ore moving from Canada by direct rail or by water-rail service to destinations in Eastern Territory is import traffic within the meaning of that term as used in the cited report and order;

And it further appearing, That, all traffic moving from all points in the United States to all destinations in Canada by direct rail or water-rail (including refined petroleum, petroleum products, and naphthalene) is export traffic within the meaning of that term as used in the cited report and order; that the prescribed limitation of 12 percent applied to increases on all export traffic; and

that therefore it is proper that the order herein be all-inclusive, covering all export traffic to Canada (including refined petroleum, petroleum products, and naphthalene);

Wherefore, and for good cause:

It is ordered, That the Eastern Territory respondents herein be, and they are hereby, notified and required to cease and desist from assessing and collecting rates on all traffic from all points in Eastern Territory to all points in Canada which are increased pursuant to the authority of the report and order in this proceeding (339 I.C.C. 125) by more than 12 percent over the Ex Parte No. 265 level; and that respondents herein be, and they are hereby, notified and required to correct their tariffs accordingly within 30 days from the date of service of this order on not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act.

This is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX D

SERVICE DATE
OCTOBER 10, 1973

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 5th day of October, 1973.

EX PARTE NO. 267
INCREASED FREIGHT RATES, 1971
(SUN OIL COMPANY OF PENNSYLVANIA)

Upon consideration of the record in the above-captioned proceeding, including the report and order of the Commission, 339 I.C.C. 125; the petition filed on July 10, 1972, by the Sun Oil Company of Pennsylvania (Sun Oil) seeking a declaratory order pursuant to section 554 (e) of the Administrative Procedure Act, 5 U.S.C. 554 (e); the Commission's order entered August 6, 1973, treating the petition as one for interpretation, and clarifying the cited report and order in this proceeding; the petitions to vacate the aforementioned order and for other alternative relief filed by the Eastern Territory railroad respondents, and jointly by CP Rail and the Canadian National Railway System, on September 4, 1973; the petition filed August 23, 1973, by the Aluminum Company of Canada, Ltd., seeking further modification of the said order of August 6, 1973; and the reply thereto filed September 11, 1973, by the respondent Eastern railroads; and

It appearing, That in regard to all export and import traffic, the cited report states at page 187:

> We are persuaded that, pending more accurate bases for equitable application of rate increases on import and export traffic, under circumstances where

varying regional increases are made, and solely for the purpose of application of the increases authorized in Ex Parte No. 267, an increase on this traffic of not more than 12 percent should be authorized * * *.

It further appearing, That the all-rail and rail-water rates on export-import traffic moving between Eastern Territory and Canada have been increased by the respondent Eastern railroads by 14 percent, equivalent to the increase authorized on domestic traffic within Eastern Territory;

It further appearing, That by order dated August 19, 1971, considering a petition for a supplemental order in Ex Parte No. 267, filed by Alan Wood Steel Company, we found that iron ore moving from Canada by direct rail or by water-rail service to destinations in Eastern Territory is import traffic within the meaning of that term as used in the cited report and order, and that, therefore, the Eastern Territory railroads' increases of 14 percent in their rates on such Canadian import shipments of iron ore were not in conformity with the limited increase of 12-percent authorized in Ex Parte No. 267, *supra*, for export-import traffic;

It further appearing, That by petition filed July 10, 1972, Sun Oil sought a determination that the 12-percent limitation authorized in Ex Parte No. 267, *supra*; should be applied to increases in commodity rates on all export traffic handled by Eastern Territory railroads or, alternatively, on petroleum, petroleum products, and naphthalene handled by those carriers; and that said petitioner further requested those those carriers be ordered to cease and desist from collecting rates on export traffic to Canada which are increased in excess of the authorized 12-percent limitation;

It further appearing, That by order of August 6, 1973, as stated, we treated Sun Oil's petition as a petition for clarification or interpretation, and required therein the application of the authorized maximum 12-percent increase on all export traffic from all points in Eastern Territory to all points in Canada;

It further appearing, That, although the petitioning carriers complain that the report and order was modified without an opportunity to be heard, in fact, notice of the filing of the Sun Oil petition was published in the Federal Register on October 26, 1972, and participation was invited "should the Commission exercise its discretion in entertaining this petition for a declaratory order;" and that the Commission is empowered to interpret and clarify when requested or deemed necessary, and to modify its orders "upon such notice and in such manner as it shall deem proper" (section 16(6)); therefore,

It is ordered, That the petitions by the Eastern Territory railroads, and by CP Rail and the Canadian National Railway System jointly to vacate the order of August 6, 1973, and for other alternative relief, be, and they are hereby, denied.

It further appearing, That the petition filed by the Aluminum Company of Canada, Ltd., requests the Commission to require respondent railroads to cease and desist from assessing and collecting any rates and charges in excess of 12 percent over the Ex Parte No. 265 level on all traffic from points in Canada to points in Eastern Territory, as well as from points in Eastern Territory to points in Canada; and that the basis for the orders of August 19, 1971, and August 6, 1973, is that the finding at page 187 of the report entered herein applies to all export-import traffic; therefore,

It is further ordered, That the said petition be, and it is hereby, granted, and that the Eastern Territory respondents herein be, and they are hereby, notified and required to cease and desist from charging rates on

export-import traffic moving by all-rail or rail-water routes between Canada and Eastern Territory which have been increased by more than 12 percent over the Ex Parte No. 265 level, subject to the four limitations specified on pages 187 and 188 of said report; and that respondents herein be, and they are hereby, notified and required to correct their tariffs accordingly within 30 days from the date of service of this order on not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act.

This is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

By the Commission.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-167

CANADIAN NATIONAL RAILWAY COMPANY AND
CANADIAN PACIFIC LIMITED,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
Defendants

AND

ALUMINUM COMPANY OF CANADA, LTD.,
Intervening Defendant

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs, Canadian National Railway Company and Canadian Pacific Limited, hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the Judgment filed in this action on November 30, 1976.

/s/ Lee A. Monroe
LEE A. MONROE
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 872-1730

Attorney for Canadian Railroad
Plaintiffs

No. 76-1069

In the Supreme Court of the United States

OCTOBER TERM, 1976

CANADIAN NATIONAL RAILWAY COMPANY AND CANADIAN PACIFIC LIMITED, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

WADE H. MCCREE, JR.,
Solicitor General,

DONALD I. BAKER,
Assistant Attorney General,

CARL D. LAWSON,
LLOYD JOHN OSBORN,
Attorneys,
Department of Justice,
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MARK L. EVANS,
General Counsel,

CHARLES H. WHITE, JR.,
HANFORD O'HARA,
Associate General Counsels,
Interstate Commerce Commission,
Washington, D.C. 20423.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1069

CANADIAN NATIONAL RAILWAY COMPANY AND CANADIAN PACIFIC LIMITED, APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the decision and judgment of a three-judge district court (J.S. App. 1a-23a) affirming orders of the Interstate Commerce Commission and enjoining appellants and other railroads from further disobedience of those orders.[1]

---

[1]The jurisdiction of the three-judge district court was founded on the now repealed Urgent Deficiencies Act, 28 U.S.C. 1336, 2321-2325, which under Pub. L. 93-584, 88 Stat. 1917, remained in effect as to review of proceedings filed prior to March 1, 1975. The Court's jurisdiction rests on 28 U.S.C. 1253.

In Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, the Interstate Commerce Commission authorized a general increase in the freight rates of railroads operating within the United States, including the Canadian railroad appellants. As in other general revenue proceedings, the Commission in Ex Parte No. 267 focused its inquiry on the railroads' collective need for increased revenues and did not address the lawfulness of the increase as applied to particular commodities or routes. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 313-314. However, the Commission did authorize the carriers to make certain permissive increases to meet the varying revenue needs of railroads operating in different regions of the country, as follows (339 I.C.C. at 257):

> (1) Intraterritorial traffic within the East - not more than 14 percent.
>
> (2) Intraterritorial traffic within the South - not more than 6 percent.
>
> (3) Intraterritorial traffic within the West - not more than 12 percent.
>
> (4) Interterritorial traffic from and to all territories - not more than 12 percent.

And, as pertinent here, the Commission authorized the following general increase on "import and export traffic" (*ibid.*):

> (5) Import and export traffic not more than 12 percent and subject to the limitations heretofore prescribed in this report.[2]

[2]As the "not more than" phrasing indicates, the permissive increases authorized consisted of a range or zone within which railroad management could establish specific rates reflecting specific competitive conditions.

In purported compliance with the Commission's decision, appellants, two Canadian railroads, and other railroads filed master tariff X-267-B,[3] containing an increase of 14 percent on rail traffic (and the rail portion of water-rail traffic) moving between the United States and Canada (J.S. App. 6a-7a). Subsequently, two shippers sought a ruling from the Commission that iron ore moving from Canada to the United States, whether all-rail or water-rail, is "import traffic" within the meaning of the Ex Parte No. 267 decision and therefore subject to a maximum increase of 12 percent (J.S. App. 7a). The railroads replied, contending that the Commission's 12 percent limitation on "import and export traffic" was not meant to include traffic moving between the United States and Canada (J.S. App. 7a n. 12). On September 24, 1971, the Commission declared that "iron ore moving from Canada * * * by direct rail or by water-rail to destinations in Eastern Territory is import traffic within the meaning of that term as used in the Commission's [Ex Parte No. 267] decision."[4] The railroads complied with that ruling and corrected their tariffs to

[3]The use of a master tariff is one of the numerous procedural advantages that accrue to the railroads when the Commission authorizes a general increase. Rather than requiring the railroads to implement the authorized increase through a time-consuming republication of each of their individual commodity tariffs, the Commission permits the railroads to put the general increase into effect immediately through publication of a short-form master tariff. In Ex Parte No. 267 the Commission also relaxed the statutory 30-day notice requirement (49 U.S.C. 6(3)) and allowed the railroads to publish their master tariff on 15 days' notice. Having thus facilitated implementation of the general increase, the Commission directed the railroads to update their individual commodity tariffs as soon as possible so that shippers would be able to ascertain the current rate on particular traffic without referring to the master tariff (339 I.C.C. at 137).

[4]A copy of that unpublished order is attached as an Appendix to this motion.

reflect an increase of not more than 12 percent on all-rail and water-rail movements of iron ore from Canada (J.S. App. 7a).

Thereafter, on July 10, 1972, another shipper requested a determination by the Commission that the 12 percent limitation on import-export traffic contained in the Ex Parte No. 267 decision applied to all commodities moving from the United States into Canada (J.S. App. 7a-8a). On August 6, 1973, the Commission issued a second order construing the 12 percent limitation on import-export traffic as applying to United States-Canadian traffic and directing the railroads to correct their tariffs to reflect an increase of not more than 12 percent on all commodities moving from the United States into Canada (J.S. App. 24a-26a). Appellants and other railroads filed a petition seeking to vacate the August 6 order and requesting an oral hearing, while yet another shipper requested a determination that the 12 percent limitation applied with equal force to traffic moving from Canada into the United States (J.S. App. 8a). By order served October 10, 1973, the Commission denied the railroads' petition to vacate the August 6 order and made it clear that the 12 percent limitation on import-export traffic applied to *all* traffic moving in either direction between the United States and Canada (J.S. App. 27a-30a).

The Canadian railroads then sought judicial review, contending that the 12 percent limitation on import-export traffic was never meant to apply to United States-Canadian traffic and that the Commission had substantively modified its Ex Parte No. 267 decision without affording the railroads a hearing.[5] The three-judge district court unanimously

[5]The Eastern United States railroads moving traffic between the United States and Canada did not seek review of the Commission orders, but continued to maintain tariffs publishing a 14 percent increase on such traffic. The government filed a counterclaim before the district court for enforcement of the Commission's orders, thereby making the Eastern railroads parties to that litigation.

rejected that argument. It held that the Commission had merely interpreted and clarified its prior report and order in Ex Parte No. 267 and that further hearings were therefore not required (J.S. App. 13a-14a).[6]

ARGUMENT

The judgment of the district court is correct, and the appeal presents no substantial question warranting plenary consideration by this Court.

Appellants have never disputed the authority of the Commission in a general revenue proceeding to authorize an increase only of 12 percent on import-export traffic (including United States-Canadian traffic) while authorizing an increase of 14 percent on traffic moving within the Eastern United States. Moreover, appellants have never claimed that they could lawfully utilize the master tariff and shortened notice period to publish an increase in excess of that authorized by the Commission's general revenue order. Instead, appellants' position reduces to a dispute over the proper interpretation of the phrase "import and export traffic" as used by the Commission in its Ex Parte No. 267 decision. The district court correctly held that the 12 percent limitation on import-export traffic was intended to apply to United States-Canadian traffic and that the Commission's

[6]The court also rejected the argument of the Eastern railroad defendants as to the counterclaim that, notwithstanding the unlawfulness of the original 14 percent increase on United States-Canadian traffic published by master tariff X-267-B, the increase was somehow legitimized through the process of updating individual commodity tariffs (J.S. App. 14a-19a). The Eastern railroads did not seek further review of that issue and have not joined in the instant appeal, but instead have commenced correction of their tariffs to comply with the Commission's orders.

subsequent orders merely served to "correct the railroads' erroneous interpretation" (J.S. App. 13a) of the original report and order. There is no reason for further review by this Court of that narrow issue of interpretation.

Because the Commission's subsequent orders were merely clarifications and interpretations of the original Ex Parte No. 267 report and order, the district court properly held that no further hearing was necessary. *Pan American Petroleum Corp.* v. *Federal Power Commission*, 322 F. 2d 999 (C.A. D.C.); 5 U.S.C. 553(b)(A).[7]

Moreover, even assuming *arguendo* that the railroads were entitled to be heard regarding the proper interpretation of the Commission's Ex Parte No. 267 decision, their views on that issue have already been forcefully presented to the Commission on two occasions. When the first two shippers complained to the Commission that the railroads had taken an excessive increase on iron ore moving from Canada, the United States Eastern railroads were notified and argued that the 12 percent limitation did not apply to United States-Canadian traffic (J.S. App. 7a n. 12; but see J.S. 4-5 n. 2). Subsequently, in response to a shipper's complaint seeking reparations for overcharges on United States-Canadian traffic, appellants joined the Eastern railroads and argued that such traffic should not be considered import-export traffic within the meaning of the

[7]Appellants suggest that a hearing was necessary simply because the Commission's interpretation of its prior decision will have an adverse financial impact upon the railroads (J.S. 7 n. 3, 20-23). However, any adverse financial impact appellants may experience will be the product not of the Commission's interpretative order but of their own error in publishing rates in excess of the authorized increase.

Commission's Ex Parte No. 267 decision. The Administrative Law Judge rejected the railroads' interpretation, and the Commission adopted his decision as its own on July 30, 1974 (Docket No. 35828, unpublished).

Accordingly, it is apparent that appellants were heard. Their real complaint is that their interpretation of the Commission's decision was rejected. However, as the district court recognized (J.S. App. 13a), an agency's interpretation of its own order controls unless it is "plainly erroneous." See *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 414.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

CARL D. LAWSON,
LLOYD JOHN OSBORN,
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MARK L. EVANS,
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CHARLES H. WHITE, JR.,
HANFORD O'HARA,
Associate General Counsels,
Interstate Commerce Commission.

MARCH 1977.

DOJ-1977-03

APPENDIX

SERVICE DATE
SEPTEMBER 24, 1971

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 19th day of August, 1971.

EX PARTE NO. 267

INCREASED FREIGHT RATES, 1971

Upon consideration of the record in the above-entitled proceeding, a petition for supplemental order filed July 9, 1971, by Alan Wood Steel Company, petition for leave to intervene filed July 20, 1971, by Jones and Laughlin Steel Corp., a petition for leave to file and accompanying petition of intervention, filed August 12, 1971, by Bethlehem Steel Corp., a petition for leave to file representations filed August 17, 1971, by Youngstown Sheet and Tube Company, and of replies to the aforesaid petitions filed July 29, 1971, and August 16, 1971, by Eastern Territory railroad respondents and;

It appearing, That rates on iron ore moving from origins in Canada to destinations in Eastern Territory published by the respondent Eastern railroads have been increased 14 percent pursuant to the increase authorized in Ex Parte No. 267 for rates within Eastern Territory and;

It further appearing, That the authority granted by the decision of the Commission in Ex Parte No. 267 for increases on import traffic was limited to 12 percent.

And it further appearing, That, upon consideration of the facts and arguments of the parties, iron ore moving from Canada, as described in the petitions, by direct

rail or by water-rail to destinations in Eastern Territory is import traffic within the meaning of that term as used in the Commission's decision, and good cause appearing therefor;

It is ordered, That Jones and Laughlin Steel Corp. be, and it is hereby, permitted to intervene in this proceeding;

It is further ordered, That the petition of Bethlehem Steel Corp. and Youngstown Sheet and Tube Company for leave to file certain accompanyimg pleadings be, and they are hereby, denied;

It is further ordered, That the petition of Alan Wood Steel Company for an appropriate Order of the Commission, be, and it is hereby, granted;

And it is further ordered, That the respondents be, and they are hereby, required to cease and desist from assessing rates and charges on import iron ore as described in the petitions which are increased by more than 12 percent over the Ex Parte 265 level and to take appropriate action to correct their tariffs not less than 10 days from the service date of this order.

By the Commission.

ROBERT L. OSWALD
Secretary

No. 76-1069

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

CANADIAN NATIONAL RAILWAY COMPANY
AND CANADIAN PACIFIC LIMITED,
Appellants,

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the Aluminum Company of Canada, Ltd. (Alcan)[1] moves that the judgment of the District Court be affirmed.

Statement

This is a direct appeal from a final judgment and decision of a three-judge district court (J.S. App. 1a-23a) unanimously upholding certain orders of the Interstate Commerce Commission and enjoining and restraining appellants and 32 other railroads from disobedience of those orders.

In Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 (1971) the Interstate Commerce Commission, following extensive hearings, authorized a general railroad freight rate increase as follows:

[1] Alcan was a party in interest to the proceedings before the Interstate Commerce Commission and intervened as of right pursuant to 28 U.S.C. §2323 in the District Court action.

"(1) Intraterritorial traffic within the East—not more than 14 percent.

(2) Intraterritorial traffic within the South—not more than 6 percent.

(3) Intraterritorial traffic within the West—not more than 12 percent.

(4) Interterritorial traffic from and to all territories—not more than 12 percent.

(5) Import and export traffic not more than 12 percent and subject to the limitations heretofore prescribed in this report . . ." 339 I.C.C. at 257.

In purported compliance with the above authorization, appellants and other railroads filed tariffs effective April 12, 1971, containing a 14% increase on rates applicable to rail traffic moving between the United States and Canada. Shortly thereafter, two shippers filed a petition with the Commission complaining that iron ore moving from Canada to the United States is import traffic within the meaning of the Ex Parte No. 267 order and that only a 12% increase was authorized. Appellants and other railroads replied. On September 24, 1971, the Commission issued its order finding:

". . . iron ore moving from Canada . . . is import traffic . . . ."

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[2]Ex Parte No. 267 was a general revenue case wherein the focus of attention is upon the rialroads' need for revenue. The Commission determines whether an increase in rate levels is justified by the evidence of record and the amount. It normally exercises its discretion and grants "special permission" for the rialroads to deviate from tariff publishing and other rules, and an order is entered permitting the filing of tariffs containing increases up to the maximum amount allowed. Individual rates are considered in later proceedings following complaint or on the Commission's own initiative. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 313-314 (1975); *New York* v. *United States*, 311 U.S. 284, 350 (1947); *United States* v. *Louisiana*, 290 U.S. 70 (1933); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517, 521 (N.D. Fla. 1956) aff'd *per curium* 352 U.S. 1021 (1957); *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935).

A cease and desist order was issued prohibiting the railroads from including in their tariffs more than a 12% increase on this traffic, and the railroads complied and corrected their tariffs.

On July 10, 1972, another shipper filed a petition with the Commission requesting a determination that the 12% limit on import-export traffic applied on all commodities moving from the United States into Canada. The Commission, on August 6, 1973, citing the September 24 order, issued a second cease and desist order prohibiting the railroads from including in their tariffs more than a 12% increase on rail rates from the United States to Canada. On August 23, 1973, Alcan filed a petition seeking to make the August 6 order applicable to traffic moving from Canada to the United States. Numerous railroads replied. Shortly thereafter, appellants and other railroads filed a petition seeking to vacate the August 6, 1973, order and requesting oral hearings. These petitions argued that U.S.-Canada rail traffic should not be considered "import-export." On October 10, 1973, the Commission denied the railroads' petitions to vacate the August 6 order and extended it to cover traffic moving in both directions between the United States and Canada. The railroads then sought judicial review.

The three-judge district court unanimously held *inter alia* that the orders of the Commission were interpretations and clarifications which did not alter or substantially change the meaning of the earlier Report and Order in Ex Parte No. 267 and that additional hearings were not required. (J.S. 13a-14a).

Argument

This appeal presents no substantial question warranting plenary review, and the judgment below should be affirmed. When appellants and other railroads in purported compliance with the Commission's Ex Parte No. 267 order published increases in excess of those authorized, the Commission, after receiving shipper petitions, properly required the railroads to cease and desist. The only question before the Commission was whether traffic moving to or from Canada is "import-export" within the meaning of the Ex Parte No. 267 order. This was plainly an interpretive question, and the District

Court correctly held that oral hearings were not required. *Pan American Petroleum Corp. v. Federal Power Commission*, 322 F.2d 999 (D.C. cir. 1963).

In any event, appellants have already had a full hearing on all issues. On April 10, 1973, Alcan filed a formal complaint with the Commission seeking reparations from appellants and other railroads for the overcharges resulting from the rate increases in excess of those authorized in Ex Parte No. 267. Oral hearings were held and briefs filed with the Commission on all issues including whether U.S.-Canada traffic is "import-export" within the meaning of the Ex Parte No. 267 order. On January 25, 1974, the Administrative Law Judge issued his recommended decision in Docket No. 35828 (unpublished) finding in favor of Alcan and awarding reparations. Appellants and other railroads filed exceptions, and on July 30, 1974, the Commission adopted the initial decision as its own.

Conclusion

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that three copies of the foregoing Motion to Affirm were served on all known parties of record in this proceeding in accordance with Rule 33, paragraph 1, of the Rules of the Supreme Court of the United States, this _____ day of March, 1977.

Barry Roberts

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APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Appellants, Canadian National Railway Company and Canadian Pacific Limited, pursuant to Rule 16(4) of this Court's Rules, submit the following as their brief in opposition to the motions to affirm filed herein:

PRELIMINARY STATEMENT

On February 3, 1977, Appellants filed their Jurisdictional Statement, contending that the three-judge court below erred in its refusal to set aside an order of the Interstate Commerce Commission (the Commission) which Appellants contended was issued in violation of the notice and hearing requirements of law. Motions to affirm

have been filed jointly by the United States and the Interstate Commerce Commission (hereafter the United States) and by the Aluminum Company of Canada, Ltd. (Alcan), an intervening defendant in the proceedings below.

ARGUMENT

The United States and Alcan fail to deal with the contentions advanced by Plaintiffs in their Jurisdictional Statement. They make no effort to meet Appellants' argument that the Commission may not, by virtue of the plain language of Section 15(1) of the Interstate Commerce Act, issue a "cease and desist" order, such as the challenged order, without first holding a hearing (J.S., pp. 9-11); they fail to deal with the contention, and cases in support thereof, that the challenged order was a substantive rule or modification as to which the Administrative Procedure Act requires a hearing (J.S., pp. 12-19); and they fail to reply to Appellants' contention, also supported by case law, that the challenged order had such a substantial impact upon the regulated carriers that a hearing was required as a matter of fundamental fairness (J.S., pp. 20-21).

Instead, the United States and Alcan assert, without discussion and without supporting case law, that the challenged order was merely an interpretation or clarification of the Commission's original order in the Ex Parte 267 proceeding and for that reason a hearing was not required. They contend also that even if a hearing was required, such a hearing was afforded the railroads in other proceedings.

Neither contention has any merit.

I.

THE CHALLENGED ORDER DID NOT INVOLVE AN INTERPRETATIVE QUESTION

In their Jurisdictional Statement (pp. 12-19), Appellants demonstrated that the challenged order did not merely interpret the Commission's original order in Ex Parte 267, but rather effected a substantive change in that order.

The only response of the United States and Alcan to that showing is the unsupported assertion that the challenged order was a mere interpretation.[1] They then argue that because it was, in their view, a mere interpretation a hearing was not required, citing *Pan American Petroleum Corp.* v. *Federal Power Commission*, 322 F.2d 999 (D.C.Cir. 1963). But, as Appellants have already shown (J.S., p. 17 n. 12), that case is not in point. In *Pan American*, the Court of Appeals was concerned with an FPC order in reopened proceedings which required gas producers to refund a portion of amounts collected by them. The producers contended on review that the order was issued without "hearing." The court rejected that contention, not because a hearing was not required,

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[1] In its Motion, the United States asserts (p. 7) that an agency's interpretation of its own order controls unless it is plainly erroneous, citing *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410 (1945). The *Bowles* decision has been interpreted to mean that where the agency's language is not free from doubt, a court is "obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such" (*Ehlert* v. *United States*, 402 U.S. 99, 105 (1971)). In this case, the Commission's subsequent "interpretation" of "export-import" was plainly not reasonable in light of the plain definition of that term in its original report and order (J.S., pp. 13-14), and that "interpretation" was hardly consistent in light of the Commission's failure to rule at an early date, as it had opportunities to do (J.S., pp. 15-16), that all rail traffic between the United States and Canada was included within the term "export-import."

but rather because of the opportunity which the FPC did afford the producers to submit written evidence and written evidence satisfied the requirements of procedural due process (322 F.2d at 1004-1005).

In this case, no hearing of any kind preceded the issuance of the challenged order.

II.

A HEARING SUBSEQUENT TO THE ISSUANCE OF THE CHALLENGED ORDER AND IN A DIFFERENT PROCEEDING DOES NOT CURE THE FAILURE TO HOLD A HEARING IN THE FIRST INSTANCE; THE SUBSEQUENT HEARING WAS IN FACT NO HEARING AT ALL

The United States contends that even if a hearing were required, the railroads "views on that issue have already been forcefully presented to the Commission on two occasions" (Motion, p. 6). The United States refers (1) to the so-called *Alan Wood Steel* proceeding involving a single commodity (see J.S., p. 4 n.2), and (2) to the subsequent hearing in respect of a complaint for damages (reparations) filed by Alcan (Docket No. 35828). Alcan, in its motion, also refers to the hearing held in its subsequent complaint proceeding as serving to satisfy any hearing which might have been required for issuance of the challenged order.

Alan Wood Steel Proceeding—Appellants were not afforded a hearing in this proceeding for the simple reason that they never received notice of it (J.S., p. 4 n.2).

Alcan Complaint Proceeding—The hearing in this separate proceeding was held *subsequent* to the issuance of the challenged order. While the Canadian railroads did present evidence in that subsequent proceeding showing that U.S.-Canadian rail traffic and the rates applicable thereto have never been considered "export-import"

and that they were no so considered by the Commission in its Ex Parte 267 report, the fact is that both the Administrative Law Judge who decided the matter initially and Division 2 of the Commission which sustained him on appeal were bound by the challenged order —a prior order of the full Commission. For example, the Administrative Law Judge stated that

> ". . . that portion of the complaint which seeks affirmative relief through a 'cease and desist order' for the future has recently been decided and disposed of in Commission's Order of October 5 and served October 10, 1973 [a companion order to the challenged order], Ex Parte No. 267, *Increased Freight Rates, 1971* (*Sun Oil Company of Pennsylvania*) . . ." [2]

Similarly, in its Decision and Order served July 30, 1974, Division 2 of the Commission affirmed the Administrative Law Judge on the premise that the matter had already been decided in the *Sun Oil* phase of the Ex Parte 267 proceeding.

Thus, the subsequent hearing to which the United States and Alcan refer was in reality no hearing at all and the fact remains that Appellants have never been afforded a hearing—and certainly none prior to the issuance of the challenged order—in respect of their contention that neither the railroads nor the Commission, and particularly in its original Ex Parte 267 report, have never considered all-rail U.S.-Canadian traffic and the rates applicable thereto to be "export-import."

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[2] Administrative Law Judge's Initial Decision served January 25, 1974, in I.C.C. Docket No. 35828, sheet 2 (Unreported).

CONCLUSION

This Court should note jurisdiction, hold that the challenged order was not issued in accordance with law, and summarily reverse the decision below.

Respectfully submitted,

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